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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BY: _____
DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS E. MOWER, LESLIE D.
MOWER, JAMES THOMPSON,

Defendants.

MEMORANDUM DECISION AND
ORDER

Case No. 2:02CR787DAK

This matter is before the court on all pending motions filed by the Defendants: Defendant Thomas E. Mower's Motion to Partially Unseal Transcript of *Ex Parte* Hearing and Compel Production of Related Evidence, which was joined at oral argument by Leslie D. Mower and James Thompson, Defendants Thomas Mower and Leslie D. Mower's Motion to Dismiss Counts Two through Five of the First Superseding Indictment for Lapse of Statute of Limitations,¹ Defendant Leslie D. Mower's Motion for Severance, all Defendants Motions for Disclosure of Rule 404(b) Evidence, Defendant James Thompson's Motion in Limine Regarding Prior Convictions, and Defendant James Thompson's Motion for James Hearing, which was joined in at oral argument by Defendants Thomas Mower and Defendant Leslie D. Mower. A hearing on the motions was held on March 16, 2004. At the hearing, the United States was represented by

¹ Defendant Thomas Mower also filed a Motion to Dismiss Counts Two through Five Relating to Pre-indictment Delay, however, that motion was withdrawn by his present counsel.

Caryn D. Mark, Defendant Thomas Mower was represented by Max D. Wheeler, Defendant Leslie D. Mower was represented by Neil A. Kaplan and Anneli R. Smith, and Defendant James Thompson was represented by Scott Williams. The court took the motions under advisement. The court has considered carefully the memoranda and other materials submitted by the parties, as well as the law and facts relating to the motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. Thomas Mower's Motion to Partially Unseal Transcript of Ex Parte Hearing and Compel Production of Related Evidence

On November 6, 2002, the government had an *ex parte* hearing before Judge Benson and obtained an order compelling the grand jury testimony of Allen Davis, an attorney for Neways and Thomas Mower. Judge Benson concluded that the crime fraud exception applied because the documents and conversations were in furtherance of a crime or fraud. Thomas Mower now seeks to partially unseal the hearing transcript and any evidence provided to Judge Benson in support of that motion to compel so his attorneys can determine whether the government's conduct violated his due process rights.

A defendant may claim that his due process rights have been violated by prosecutorial misconduct occurring prior to indictment. *United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000). However, the misconduct must shock the conscience of the court and can include a pre-indictment invasion of a defendant's attorney-client relationship. *Id.* at 1194-95. In *Kennedy*, the court stated that

In order to successfully raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2)

deliberative intrusion into that relationship; and (3) actual and substantial prejudice.

225 F.3d 1187, 1195 (10th Cir. 2000).

There appears to be no dispute that during the time in question, Mr. Davis acted as corporate counsel for Neways and as personal counsel for Thomas Mower. The government obviously knew this relationship existed when it brought its motion to compel grand jury testimony under the crime fraud exception.

Thomas Mower argues that as to the second element, the government's intrusion into the attorney-client relationship was deliberative and Davis' prior grand jury testimony did not support a finding that the testimony would fall under the crime fraud exception to the attorney-client privilege. However, the government argues that there was no intrusion on the attorney-client privilege because the information sought and obtained from Davis fell within the crime fraud exception to the attorney-client privilege.

In a grand jury investigation, the determination of whether or not the government shows a prima facie foundation for the application of the crime fraud exception to the attorney-client relationship lies in the discretion of the court and can be made on an *ex parte* basis. *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976). The target has "no constitutional due process right to an adversary hearing on the question of whether a common law claim of privilege precludes grand jury examination. *Id.* at 737-38. Once the prima facie foundation is made, no more is required in the context of the grand jury investigation. The admissibility of compelled evidence is determined at trial. *Id.*

To invoke the crime-fraud exception, the government must make a prima facie showing that the purportedly privileged communications were used in furtherance of a crime or fraud.

Motley v. Marathon Oil Co., 71 F.3d 1547, 1552 (10th Cir. 1995). The government must show that the alleged crime or fraud has some foundation in fact and that there is some relationship between the communication and the crime or fraud. The prima facie foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury. *In re Vargas*, 723 F.2d at 1467.

Thomas Mower alleges that the government made surreptitious representations to the court and that the court relied solely on the government's version of facts. However, Tenth Circuit law is clear that Mower was not entitled to review the government's motion to compel grand jury testimony or to have an adversarial hearing on the matter. Moreover, the testimony from Allen Davis from his first grand jury appearance can be used by the government to show that the crime fraud exception to the attorney-client privilege applies. The government has produced to defendants Allen Davis's grand jury testimony. The transcript, in and of itself, is evidence of the knowing participation of Attorneys Allen Davis and James Thompson in the alleged tax fraud scheme. The testimony of Davis' first appearance in front of the grand jury provided a sufficient basis for Judge Benson to make a finding that the crime fraud exception applied. Because Defendants also have that evidence, there is no need to unseal any of the other materials presented to Judge Benson for his consideration of the issue.

To the extent that Defendant argued that he needs the materials submitted to Judge Benson to determine whether the testimony elicited at Davis' second grand jury appearance went beyond the scope of the order, the order itself is all that Defendant needs for such purposes. In addition, Defendant argues that he has a strong interest in obtaining this information, whereas the government has little, if any, interest in keeping the transcript sealed because it already got what

it needed from this evidence. However, there is a strong public interest in grand jury secrecy within the federal courts and the standard for obtaining information related to grand jury proceedings is high. *In re Lynde*, 922 F.2d 1448, 1452 (10th Cir. 1991). Defendant has failed to show that there is a particularized need for the materials in order to avoid injustice. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). A particularized need is “more than a wish to go fishing for useful material.” *United States v. Jackson*, 863 F. Supp. 1449, 1456 (D. Kan. 1994).

In this case, Mower has advanced only vague and general allegations that since the government has not voluntarily released grand jury materials it raises an inference as to its veracity and accuracy. This is not a sufficient showing. He has alleged no facts which support a particularized need to materials other than those already provided by the government, namely, the transcript of Allen Davis’s grand jury testimony and Judge Benson’s order. Therefore, Defendant’s Motion to Partially Unseal Transcript of *Ex Parte* Hearing and Compel Production of Related Evidence is denied.

II. Leslie Mower’s Motion to Dismiss Counts Two – Five of the First Superseding Indictment and Thomas Mower’s Motion to Dismiss Counts Two, Three, Four, and Five of the First Superseding Indictment for Lapse of the Statute of Limitations

Thomas and Leslie D. Mower (“the Mower Defendants”) argue that Counts Two through Five of the First Superseding Indictment should be dismissed because they are barred by the statute of limitations. On December 19, 2002, the government filed its original Indictment against Leslie D. and Thomas Mower, charging conspiracy and six counts of attempted tax evasion. The First Superseding Indictment, filed on April 8, 2003, is substantially the same with respect to Counts Two through Five. The parties agree that the First Superseding Indictment

relates back to the date of the original Indictment for purposes of these motions.

The First Superseding Indictment alleges that the Mowers, as owners of several multi-level marketing companies, attempted to evade income tax for certain enumerated years by committing affirmative acts of evasion, including the filing of false and fraudulent joint individual tax returns that omitted individual commissions and including individual income as corporate income on corporate returns. The counts at issue in these motions are two through five, which relate to the tax years 1992 through 1995 -- Count two is the 1992 personal return filed on October 15, 1993, Count three is the 1993 personal return filed on April 12, 1994, Count four is the 1994 personal return filed on April 14, 1995, and Count five is the 1995 personal return filed on April 15, 1996.

The IRS began investigating as early as 1996 and conducted interviews in 1997, 1998 and 1999. The indictment also charges that in September and October of 1998, the Mower Defendants filed false Amended corporate tax returns for Neways, Inc. for the years 1992 through 1995. The government alleges that in these amended corporate tax returns, the Mowers attempted to further conceal their receipt of individual commission income during 1992 through 1995. There are also allegations that the Mowers falsified corporate books and records and caused phoney loan documents to be presented to the IRS within six years of the indictment.

Under 26 U.S.C. § 7201, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony." "A tax evasion prosecution must be commenced within six years after the commission of the offense." *United States v. Payne*, 978 F.2d 1177, 1178-79 (10th Cir. 1992). "Generally the statute of limitations does not begin to run until the crime is complete." *Id.* at 1179. The

essential elements of a Section 7201 violation for attempted tax evasion are (1) the existence of a substantial tax deficiency; (2) an affirmative act constituting an evasion or attempted evasion of the tax; and (3) willfulness. *Id.* at 1178.

The issue presented in Defendants' motions is whether the six-year statute of limitations for attempted tax evasion begins to run from the date of the fraudulent tax return or the date of the last affirmative act of evasion. In *Payne*, the Tenth Circuit was faced with deciding whether the statute of limitation for tax evasion under Section 7201 began to run on the date the return was actually filed or the date the return was due and the taxpayer incurred a tax deficiency. 978 F.2d 1177, 1179 (10th Cir. 1992). The Tenth Circuit found that the statute began to run on the date that the return was due because even though an affirmative act of evasion may have been committed before the return due date, the offense was not complete until there was a tax deficiency incurred on the date the return was due. *Id.* at 1179.

Subsequently, in *United States v. Anderson*, 319 F.3d 1218 (10th Cir. 2003), the Tenth Circuit decided to join its sister circuits in holding that "[w]hen a taxpayer commits a series of evasive acts over several years after incurring a tax liability, the statute of limitations for tax evasion begins to run on the date of the last evasive act." 319 F.3d at 1219. The *Anderson* court determined that where the defendant had filed an earlier tax return in 1992 and continued to file tax returns through 1996 in which the defendant denied having an interest in a foreign bank account that he could be charged with tax evasion under Section 7201 under an indictment filed in March 1999. The court reasoned that the defendant had committed a "series of evasive acts over several years" and the statute of limitations did not run until the date of the last evasive act. *Id.* at 1219. The *Anderson* court was concerned that if the statute of limitation began running

before the last affirmative act of evasion, it “would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed.” *Id.* at 1220.

Defendants contend that the holdings of *Payne* and *Anderson* are in conflict and that this court should apply *Payne* because it is the earlier case. However, the cases are factually distinct. In *Payne*, the taxpayer’s affirmative acts of evasion all occurred before the date the tax returns were due. Whereas, in *Anderson*, the taxpayer committed a series of evasive acts, including acts after the date the tax returns were due. In addition, both cases claim to be consistent with each other.

In *Payne*, the Tenth Circuit held that the earliest that the crime of tax evasion can be completed is when the federal income tax return is due. However, *Payne* further noted that several circuits had found that the prosecution of tax evasion is timely if commenced within six years of the last affirmative act of evasion. 978 F.2d at 1179 n.2. The *Payne* court recognized that these cases were consistent with its holding. *Id.* n.2. It further recognized that these courts had extended the statute of limitations beyond six years after the defendant incurred a tax deficiency when the defendant had “taken a *subsequent* affirmative act to conceal his crime.” *Id.* n.2 (emphasis added). The *Anderson* court also expressly stated that its holding was consistent with *Payne*. *Anderson*, 319 F.3d at 1220.

Defendant argues that the cases relied on by the *Anderson* court do not stand for the broad proposition for which the *Anderson* court uses them. Defendants contend that the cases are either factually dissimilar in that they involved cases where a return was never filed or relied on the finding of a single affirmative act in order to find a completed offense. However, the

court has reviewed each of these cases and concludes that several of the cases are factually similar and the clear holding of these cases is that the statute of limitations begins to run on the date of the last affirmative act, not just one affirmative act. *See, e.g., United States v. Dandy*, 998 F.2d 1344, 1355-56 ((6th Cir. 1993) (concluding 1990 indictment of 1982 and 1983 false tax returns was timely because statute of limitations began to run on the date of the last affirmative act of evasion given defendant's evasive acts in 1985 after the date the false returns were filed prevented the IRS from learning about defendant's income tax fraud); *United States v. Winfield*, 960 F.2d 970, (11th Cir. 1992) (“[T]he statute of limitations in relation to Section 7201 begins to run upon the last act of evasion. Indeed, no alternative formulation can be reconciled with the instruction of *Beacon Brass* in combination with Congress’ intention that the limitations period should begin to run at the time the defendant commits the acts upon which the crime is based.”) *United States v. Detar*, 832 F.2d 1110, (9th Cir. 1987) (““Overt, affirmative acts committed . . . through 1985 are sufficient to keep the action alive.”);.

Accordingly, the court concludes that both decisions of the Tenth Circuit are consistent with the conclusion that the statute of limitation begins to run on the date of the last affirmative act of evasion. “Acts of evasion, and specifically false statements to the IRS that occur subsequent to the due date of the unpaid taxes can be included in the indictment as part of the felony violation.” *Winfield*, 960 F.2d at 973. In this case, the government has alleged affirmative acts of evasion in furtherance of the charges in the indictment for each of the years in Counts II through IV. The indictment charges that in September and October of 1998, the Mower Defendants filed false Amended corporate tax returns for Newways, Inc. for the years 1992 through 1995, which attempted to further conceal the Mowers’ receipt of individual income

during 1992 through 1995. There are also allegations that the Mowers falsified corporate books and records and caused phoney loan documents to be presented to the IRS within six years of the indictment. Therefore, Counts II through IV are not barred by the statute of limitations, and Defendants' motion to dismiss is denied.

III. Defendant Leslie D. Mower's Motion for Severance

Leslie D. Mower requests a severance arguing that it is necessary to protect her right to confront James Thompson regarding his statements to the government which incriminate her and to avoid prejudicial spillover because of an alleged significant disparity in the quantity and quality of evidence as between her, Thomas Mower, and James Thompson.

Under Rule 14 of the Federal Rules of Criminal Procedure, "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Utah R. Crim. P. 14(a).

The First Superseding Indictment charges all defendants with conspiracy to commit tax evasion, charges Thomas and Leslie D. Mower with attempted tax evasion, and James Thompson with obstructing the administration of the IRS. Thomas and Leslie D. Mower are the co-founders and co-owners of Neways companies in several countries, and James Thomas was corporate counsel for Neways. Thomas Mower was CEO and Leslie Mower was CFO of Neways.

The Tenth Circuit follows the general rule that individuals charged together should be tried together. *United States v. Wright*, 932 F.2d 868, 876 (10th Cir.), *cert. denied*, 502 U.S. 962

(1991). “A defendant wishing to obtain severance must show actual prejudice at trial will result from failure to sever the trials.” *United States v. Sanders*, 929 F.2d 1466, 1469 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991). Moreover, in a conspiracy trial where the “evidence overlaps and the offenses arise from the same series of acts or transactions,” joinder is favored. *United States v. Scott*, 37 F.3d 1564, 1579 (10th Cir. 1994), *cert. denied*, 513 U.S. 1100 (1995).

Defendant Leslie D. Mower argues that the first basis for severance is the necessity of protecting her right to confront James Thompson regarding a statement he gave to the government on March 13, 2003, which specifically incriminates her.

In *Bruton v. United States*, 391 U.S. 1234 (1968), the Court prohibited joint trials where the prosecution introduces a non-testifying defendant’s out-of-court statement that inculpatates, but is admissible against a co-defendant. The Court rejected “limiting instructions as an adequate substitute for [the co-defendant’s] constitutional right of examination.” *Id.* at 137. *Bruton* requires the court to either bar the potentially incriminating out-of-court statement in a joint trial or sever the trials and permit the government to use the statement.

The government argues that Defendant’s right to confront witnesses is in no way abrogated by a joint trial. In *Bruton*, the court dealt with a co-defendant’s confession not statements. *United States v. Hill*, 901 F.2d 880, 883 (10th Cir. 1990); *United States v. Rogers*, 652 F.2d 972, 976 (10th Cir. 1981)(noting arguments in favor of extending the rule’s application to co-defendant’s statements have been rejected). The Tenth Circuit has referred to *Bruton* as a narrow rule. Where an admission implicates a co-defendant, the appropriate remedy is limiting instructions to the jury that statements made by each defendant are to be considered only as evidence applicable to the defendant making the statement and not to the other co-defendants.

Rogers, 652 F.2d at 976. Also, the admissibility of Thompson's statement would be subject to the same constitutional and evidentiary scrutiny whether defendant Leslie Mower is joined for trial or tried separately. Because many of these statements may not even be admissible under the new standard for prior testimonial evidence, *see Crawford v. Washington*, 2004 WL 413301 (March 8, 2004) (prior testimonial statements by unavailable witness are barred unless prior statements were subject to cross examination), the court finds no justification for severance on confrontation grounds.

Defendant also argues that in this case, severance would be appropriate because of prejudicial spillover. Defendant asserts that she is a minor participant in the alleged conspiracy and fraud and that the weight and nature of the evidence against Thomas Mower and James Thompson will render it impossible for the jury to fairly consider the evidence with regard to her. However, Defendant fails to show the requisite prejudice arising from a joint trial with her co-defendants.

Because the indictment alleges that Leslie D. Mower was a material participant in the tax fraud conspiracy and tax evasion scheme, her claims of spillover and guilt transference are without merit. Although Leslie D. Mower is named alone in only 5 of the 58 paragraphs, she is jointly named with Thomas Mower in 40 of the 58 paragraphs alleging overt acts in furtherance of the conspiracy. Defendant's alleged overt acts demonstrate her level of involvement and refute her characterization of having only a minimal role. At this point, it would be improper for the court to determine the weight of the evidence against Defendant aside from the allegations in the Superseding Indictment. However, based on the allegations of the Superseding Indictment, the court finds no basis for severance on the grounds of prejudicial spillover. Therefore,

Defendant Leslie D. Mower's motion for severance is denied.

IV. Motions for Disclosure of Rule 404(b) Evidence

All defendants have moved for immediate disclosure of Rule 404(b) evidence. At the hearing on these motions the court set the deadline for the government to provide its notices of intent to use Rule 404(b) evidence for September 30, 2004.

V. James Thompson's Motion for James Hearing

Thompson asks the court for a hearing under *United States v. Owens*, 70 F.3d 1118, 1123 (10th Cir. 1995) to determine the admissibility of hearsay evidence the government intends to adduce at trial under FRE 801(d)(2)(e) involving statements of alleged co-conspirators of Mr. Thompson. The other defendants joined in this motion at the hearing.

Rule 801(d)(2)(e) allows the admission of statements that would otherwise be hearsay if they were made by a co-conspirator during the course of and in furtherance of the conspiracy. The admission of co-conspirator statements under this rule is subject to the court determining that "(1) by a preponderance of the evidence, a conspiracy existed, (2) the declarant and the defendant were both members of the conspiracy, and (3) the statements were made in the course of and in furtherance of the conspiracy." *United States v. Owens*, 70 F.3d 1118, 1123 (10th Cir. 1995), *cert. denied*, 525 U.S. 1050 (1991). The district court has discretion on when and how to make this determination as long as it makes a formal finding regarding the required elements. The district court may either hold a *James* hearing or it may conditionally admit the statements with limiting instructions. *Id.* at 1123.

The Tenth Circuit has recognized that the determination of whether to hold a hearing can be influenced by "the particular configuration of the government's evidence and the constraints

of a multi-defendant trial.” *United States v. Roberts*, 14 F.3d 502, 514 (10th Cir. 1994). In *Roberts*, the court upheld the trial court’s use of a written proffer summarizing the evidence it intended to offer at trial, continuing objections during trial, contemporaneous rulings, and limiting instructions during the trial in response to defendants’ objections. *Id.*

In this case, Defendants have been provided witness statements and co-conspirator statements through the open-file discovery process. Defendants have also been provided with the grand jury testimony of Allen Davis which evidence establishes, by a preponderance of the evidence, the existence of a tax fraud conspiracy. Accordingly, at this time, the court does not believe that deferring the *James* hearing until trial would prejudice Defendants. Nonetheless, the court concludes that the government should be required to identify the statements it intends to admit under Rule 801(d)(2)(e) by written proffer ninety days prior to trial. Defendants may then renew their request for a *James* hearing if they believe a pre-trial hearing is necessary based on the written proffers. Accordingly, Defendants motion is denied at this time.

VI. James Thompson’s Motion in Limine Regarding Prior Convictions

Thompson seeks to exclude from evidence both in the government’s case-in-chief and during cross examination, should he elect to testify, any reference to his two convictions for felony tax evasion entered on December 17, 1998 in Utah state court. Thompson relies on Rule 609 (a)(1) of the Federal Rules of Evidence which governs the admissibility of an accused’s prior felony convictions which do not involve dishonesty. However, Thompson’s state convictions for Making a False Return and Willful Evasion of Income Tax are admissible under FRE 609(a)(2) because they involve “some element of deceit, untruthfulness or falsification.” *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978); *United States v. Wolf*, 561 F.2d

1376, 1381 (10th Cir. 1977); *United States v. Smith*, 521 F.2d 374, 376 (10th Cir. 1975). Because the crimes involve dishonesty and false statements, they are admissible regardless of the punishment. In addition, the general balancing test of Rule 403 of the Federal Rules of Evidence does not apply. *Seamster*, 568 F.2d at 190. Therefore, the court has no discretion to exclude them under Rule 609(a)(2) should Thompson testify.

While the government may not question Thompson concerning the details of the state tax evasion convictions, the cross-examination may inquire into the “essential facts of conviction, the nature of the crimes, and the punishment.” *Wolf*, 561 F.2d at 1381. Furthermore, should Thompson testify and attempt “to explain away the effect of the conviction or to minimize his guilt,” the government may cross-examine him regarding any facts “which are relevant to the direct examination.” *Id.* Therefore, Thompson’s motion regarding prior convictions is denied.

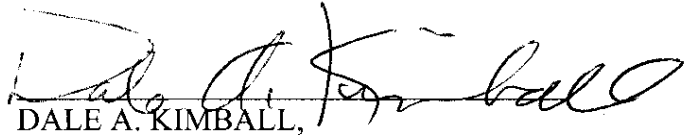
CONCLUSION

Based on the above reasoning, Defendant Thomas E. Mower’s Motion to Partially Unseal Transcript of *Ex Parte* Hearing and Compel Production of Related Evidence, which was joined at oral argument by Leslie D. Mower and James Thompson, is DENIED; Defendants Thomas Mower and Leslie D. Mower’s Motion to Dismiss Counts Two through Five of the First Superseding Indictment for Lapse of Statute of Limitations is DENIED; Defendant Leslie D. Mower’s Motion for Severance is DENIED. all Defendants Motions for Disclosure of Rule 404(b) Evidence is GRANTED IN PART AND DENIED IN PART, the government shall provide all Rule 404(b) evidence by September 30, 2004; Defendant James Thompson’s Motion in Limine Regarding Prior Convictions is DENIED; and Defendant James Thompson’s Motion for James Hearing, which was joined in at oral argument by Defendants Thomas Mower and

Defendant Leslie D. Mower, is DENIED WITHOUT PREJUDICE to be renewed, if necessary, after the government files written proffers of all hearsay statements being submitted under Rule 801(d)(2)(e). The government shall submit a written proffer of all Rule 801(d)(2)(e) statements ninety days before trial.

DATED this 24th day of March, 2004.

BY THE COURT:


DALE A. KIMBALL,
United States District Judge

United States District Court
for the
District of Utah
March 25, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cr-00787

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Scott C. Williams, Esq.
43 E 400 S
SALT LAKE CITY, UT 84111
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

USMS
DISTRICT OF UTAH
,
EMAIL

Mr. Neil A. Kaplan, Esq.
CLYDE SNOW SESSIONS & SWENSON
ONE UTAH CENTER 13TH FL
201 S MAIN ST
SALT LAKE CITY, UT 84111-2216
EMAIL

Joseph H. Thibodeau, Esq.
JOSEPH H TIBODEAU PC
155 S MADISON STE 209
DENVER, CO 80209
EMAIL

Mr. Max D Wheeler, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE
PO BOX 45000
SALT LAKE CITY, UT 84145-5000
EMAIL

Kevin M. Downing, Esq.
DEPARTMENT OF JUSTICE
TAX DIVISION, WCES
600 E ST NW RM 5506
WASHINGTON, DC 20004

EMAIL